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Attorneys for Plaintiff JENS ERIK SORENSEN,  
as Trustee of SORENSEN RESEARCH AND  
DEVELOPMENT TRUST

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

JENS ERIK SORENSEN, as Trustee of  
SORENSEN RESEARCH AND  
DEVELOPMENT TRUST,  
Plaintiff  
v.  
LEXAR MEDIA, INC., a Delaware  
Corporation; and DOES 1 – 100,  
Defendants.

) Case No. 08 CV 00095 JW  
)  
)  
**) DECLARATION OF EDWARD  
TRUITT IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
APPLICATION OF 35 U.S.C. § 295  
PRESUMPTION OF  
INFRINGEMENT**  
)  
)  
)  
Date: June 9, 2008  
Time: 9:00 A.M.  
Courtroom 8, 4<sup>th</sup> Floor  
Judge: The Hon. James Ware  
)  
)  
)  
*) Oral Argument is Respectfully Requested  
at Hearing on This Matter.*  
)

1 I, EDWARD TRUITT, declare:

2 1. I am not a party to the present action. I am over the age of eighteen. I  
3 have personal knowledge of the facts contained within the following paragraphs, and  
4 could and would competently testify thereto if called as a witness in a court of law.

5 2. At all times relevant herein I have been an attorney conducting research  
6 on a contractual basis for counsel to Sorensen Research and Development Trust  
7 ("SRDT"), Plaintiff in the above-captioned matter.

8 3. This declaration is made in support of Plaintiff's Motion for Application  
9 of 35 U.S.C. § 295 Presumption of Infringement.

10 4. I recently conducted extensive research on the factual and legal aspects  
11 of conducting discovery of Chinese nationals and Chinese companies in U.S. courts.  
12 My research revealed the following:

13 5. Two agreements govern the ability of the U.S. courts to compel  
14 discovery including depositions in China. Neither agreement provides an avenue for  
15 reasonable discovery in this matter.

16 6. Article 27(1) of the U.S.-China Consular Convention of 1980 allows  
17 consular officers of either nation to take and witness statements and testimony for  
18 use in connection with a legal proceeding of either nation; 33 U.S.T. 3048. China  
19 clarified this Convention in a series of diplomatic notes from the Chinese Ministry of  
20 Foreign Affairs to the U.S. Embassy in Beijing. The Chinese government stated that  
21 depositions under oath may only be taken by a U.S. Consular official or foreign  
22 attorney if, and only if, Beijing first gives express permission after receiving a letter  
23 rogatory through the Bureau of International Judicial Assistance of the Ministry of  
24 Justice of the People's Republic of China. (Diplomatic Note No. 106 dated 6  
25 November 1981, Diplomatic Note No. 88 dated 11 September, and Diplomatic Note  
26 No. 77 dated 11 September 1996).

27 7. On only one occasion has the Chinese government ever granted  
28 permission for a limited deposition. *United States v. Leung Pak Lun, et al* CR 88

1 0214-WHO. In connection with this one deposition, China informed the U.S.  
 2 government that the grant of permission should not be construed as precedent.

3       8. The second agreement governing discovery in China is The Hague  
 4 Conference on Private International Law Convention on the Taking of Evidence  
 5 Abroad in Civil or Commercial Matters. Upon China's accession to The Hague  
 6 Evidence Convention, China declared that the provisions of Chapter II of the  
 7 Convention except for Article 15 will not be applicable; China means that diplomatic  
 8 and consular officers may take evidence without compulsion of nationals of the  
 9 United States, only with express permission given upon application to the Chinese  
 10 government. See Dept of State, *China Judicial Assistance*, available at  
 11 [http://travel.state.gov/law/info/judicial/judicial\\_694.html](http://travel.state.gov/law/info/judicial/judicial_694.html). No depositions have ever  
 12 been allowed under this Convention. Further, it is not possible for any U.S. Court to  
 13 compel production of evidence thereby. *Id.* Attached as Exhibit A.

14       9. The Chinese strictly guard the laws on administering and swearing of  
 15 oaths. This makes voluntary depositions between private parties both very difficult  
 16 and a criminal act. When foreign attorneys or consular officials administer an  
 17 unauthorized oath in China, the penalties include arrest, detention, expulsion, or  
 18 deportation of all participants in the oath. ([http://travel.state.gov/law/info/judicial/judicial\\_694.html](http://travel.state.gov/law/info/judicial/judicial_694.html)). Attached as Exhibit B.

20       10. In *Popular Imports, Inc. v. Wong's Intern., Inc.*, 166 F.R.D. 276  
 21 (E.D.N.Y. 1996) the court upheld the admissibility of depositions taken in China,  
 22 without the use of letters rogatory. However, this was only because the issue of  
 23 legality had not been raised prior to the depositions and was deemed waived:

24           Had plaintiff raised this issue prior to the taking of the depositions, and  
 25 had the Court concluded that the procedures proposed would in fact  
 26 have violated Chinese law, the Court would of course have been loathe  
 27 to authorize procedures that would have put counsel at risk and might  
 28 well have generated diplomatic friction.

1       *Id.* at 279.

2           11. U.S. judgments cannot and will not be enforced in China. Chinese law  
3 requires the existence of a treaty or de facto reciprocity in order to enforce a foreign  
4 judgment. Neither of this exists between the United States and China.

5           12. Research reveals specific cases in which enforcement was refused and  
6 no cases in which enforcement was granted. *See* Clarke, Donald C., "The  
7 Enforcement of United States Court Judgments in China: A Research Note" (May  
8 27, 2004). GWU Legal Studies Research Paper No. 236 Available at SSRN:  
9 <http://ssrn.com/abstract=943922>.

10

11           I declare under penalty of perjury under the laws of the United States of  
12 America that the foregoing paragraphs are true and correct to the best of my own  
13 personal knowledge.

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DATED this Thursday, April 10, 2008.

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/s/ Edward Truitt  
Edward Truitt, Esq.  


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